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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1987

BADDOUR, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VOLUME II

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92PP

APPENDIX "D"

JD-408-83
Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BADDOUR, INC.

Respondent

and

HIGHWAY AND LOCAL MOTOR FREIGHT EMPLOYEES, LOCAL 667, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA — Cases 26-CA-9846, 26-CA-9957, 26-CA-6527

Charging Party

and

ELTON HILL, an Individual — Case 26-CA-9997

Charging Party

and

JERRY LEONARD WILLIAMS, an Individual — Case 26-CA-10121

Charging Party

John Goree, Esq., of Memphis, TN
for the General Counsel
John L. Koelz, Esq., and Duria
Jones, Jr., of Memphis, TN
for the Charging Party
William E. Hester III, Esq.,
and Theresa M. Gallion, Esq.,
(Kullman, Lang, Inman & Bee),
of New Orleans, LA, for the
Respondent.

DECISION

Statement of the Case

GEORGE NORMAN, Administrative Law Judge: This case was tried in Memphis, Tennessee, February 22-25, March 28-31, and April 19-21, 1983. On September 2, 1982, Highway and Local Motor Freight Employees, Local 667, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union), filed a petition requesting an election among certain employees of Baddour, Inc. (Respondent). On October 29, 1982, the election was conducted which resulted in 125 votes

cast for the Union, 199 cast against the Union, 9 challenged ballots.

The Union filed objections to the election and the Acting Regional Director recommended a hearing on certain of those objections. On August 30, 1982,[1] the Union filed charge No. 26-CA-9846 and an amended charge on October 6. The complaint was issued by the Regional Director of Region 26 on October 6, which complaint was amended on October 19. On October 5, the Union filed charges 26-CA-9957 and 26-CA-9957-2. On December 13, those charges were amended and on December 21, the Regional Director issued a complaint based on those charges and consolidated the matters for hearing.

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[1]/ All dates herein occurred in 1982 unless otherwise stated.

On December 2, Elton Hill filed charge 26-CA-9997 and on December 28, the Acting Regional Director issued a complaint and order consolidating that charge with Case Nos. 26-CA-9846 and 26-CA-9957. On January 18, 1983, the complaint in Case Nos. 26-CA-9846, 9957 and 9997 were consolidated for hearing with the objections in 26-RC-6527.

On March 8, 1983, Jerry L. Williams filed charge No. 26-CA-10121, and on March 16, the Regional Director issued a complaint based on that charge. Thereafter, Counsel for the General Counsel filed a motion to consolidate Case Nos. 26-CA-10121 with 26-CA-9846, 9957, 9997 and 26-RC-6527. Over

Respondent's objections, I ordered the cases consolidated for hearing.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

Findings of Fact

I. Jurisdiction

Respondent is a corporation with an office and place of business in Memphis, Tennessee, engaged in the distribution of consumer goods. Annually, in the course and conduct of its business operations, Respondent sold and shipped from its Memphis, Tennessee, facility, products, goods and materials valued in excess of $50,000 directly to points outside the State of Tennessee. Annually, Respondent, in the course and conduct of

its business operations, purchased and received at its Memphis, Tennessee, facility, products, goods and materials valued in excess of $50,000 directly from points outside the State of Tennessee. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Issues

1. Whether the Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating employees' union membership, activities and sympathies;

(b) Soliciting employee grievances and impliedly promised to rectify such grievances;

(c) Threatening an employee with more onerous working conditions if the employee supported the Union;

(d) Threatening its employees with plant closure if its employees selected the Union to represent them;

(e) Engaging in numerous acts of surveillance of its employees in order to discover their union activities;

(f) Since on or about April 1, 1982, maintaining an invalid solicitation and distribution rule?

2. Whether David McCollum was a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section

2(13) of the Act during the period of August 16 through 20, 1982?

3. Whether Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Giving a written warning to its employee Larry Mayes;

(b) Discharging its employees Larry Mayes, David Cordray and Patrick Amsden;

(c) Transferring of its employee Jerry Williams to a less desirable position of employment and assignment to a more onerous work task;

(d) Giving a written warning to its employee Jerry Williams and placing him on probation.

4. Whether Respondent violated Section 8(a)11), (3) and (4) of the Act by causing the withdrawal of workmen's compensation benefits from employee Jerry

Williams because he gave testimony in the instant case.

5. Whether Respondent violated Section 8(a)(3) and (1) of the Act by its transfer of employee Elton Hill to a less desirable position of employment and assignment to a more onerous work task.

IV. The Alleged Unfair Labor Practices

Background

Respondent has a distribution center in Memphis, Tennessee. It distributes consumer products, including household items, dry goods, and health and beauty aids, and services discount stores.

The Union Organizing Drive

On August 13, employee Larry Mayes contacted Duria Jones, an organizer for the Union to inquire about organizing the

employees of Respondent. The Union thereafter conducted an organization campaign among the warehouse, maintenance and transportation employees of Respondent at its Memphis facility. The first Union meeting was held on Tuesday, August 17 and the second on August 19.

On Tuesday, August 24, Paul Baddour, Respondent's President, distributed a question and answer leaflet addressed to all of the employees concerning the Union. On September 2, a petition for an election was filed by the Union and a hearing on September 22 resulted in a stipulation for certification upon consent election. The stipulation was approved on the same date, and an election was held on October 29. The

results of the election have already been stated above.

On October 25, Paul Baddour, according to the testimony of employee Elton Hill, gave a speech to 15 employees in a small training room. A few of the employees at the meeting wore, "I Am For Baddour" T-shirts and Hill had Union buttons pinned on his shirt at the time. Hill further testified that Paul Baddour stated at that meeting that he was glad that some of the employees had sense enough to vote for the company, that there are some who don't care for their jobs, and that we don't need people like that working for us. Hill said that about 7 employees including himself wore Union buttons in the plant, including

David Durrough, Anthony Eisworth, Lowell Williams, Anita Neal and Danny Fitch.

Employee Jeffrey Ruffin testified that in mid-September, President Paul Baddour gave a speech to about 20 employees in the plant that lasted about 1 hour. He said that in his speech Paul Baddour had said that the company has no place for anyone, "going to be in the Union, and the Union -- well, all they'll do is take you out on strikes and the strikers, they'll be replaced and the people who are hired to replace you, they could keep your job if they elect to and you'll just be put on the list -- a waiting list".

Employee Kyle Wade Love testified that in late September or mid-October,

the third shift employees were called to a meeting in the small training room. Love testified, "Mr. Paul (Baddour) called us in there on third shift and said he wanted to have a meeting with us and he started showing some slides -- one of them had -- what use to be a house and all that was standing was the chimney. It had been burned down. He said some of this was the violence that can happen during a strike.'' He said that Baddour also told the employees at the meeting that if they need union representation, there was no room for them in the company. Love testified that there was about 60 employees present at that meeting.

Employee Jerry Britton testified that two weeks prior to the election a meeting

was held in the small training room with about 20 or 25 employees present. He testified that Paul Baddour stated there was no place for anyone in this company that wants the Union. Britton testified that Baddour stated that, "if we thought that we needed a Union to represent us, that we were in the wrong place. He said only a few of them, maybe 5 or 10, really wanted a union, but they don't know me very well." Britton testified further that during the week of the election, Baddour gave a speech to the whole plant. He said that there was no place for anyone in the company that wanted a union.

Employee Danny Fitch testified that in mid-October the employees of the first shift were called to a meeting in the

warehouse cafeteria at about 7 a.m. He said all supervisors were present at that meeting, at which Paul Baddour gave a speech. Fitch testified as follows: "The only thing that I can remember out of the speech is that he said that the Union had a bad reputation of burning down houses and blowing up cars and they was mixed in with the mafia and there was no place in the company for people who wanted representation like this".

Baddour testified that he gave speeches to employees on October 25, 26, 27 and 28. He said that the purpose of these meetings was "to set the record straight" in response to attacks leveled on his character by Union propaganda. He said he spoke for approximately 1 hour in each of the six sessions in these three

days. On the first three days he presented to his employees a personal autobiography so they might be aware of his personal accomplishments, his standing in the business community, and the underlining goals towards which he strived on behalf of the company. He mentioned that he had received numerous scholastic and other awards while in high school and college. He received degrees in both law and accounting while in college and he was active in church and civic affairs. He told his employees how important his beliefs in christian doctrine were and that he had written a book concerning these matters which was published throughout the entire United States.

Baddour further testified that at the meetings held on October 25, 26 and 27, he told his audiences that a young female employee of the company who had engaged in handbilling activities on her own behalf, overheard comments made by Duria Jones, the representative of the Union, as he was handbilling on the Union's behalf. Baddour told the assembled employees that she told him that the Union organizer encouraged company employees to attend union meetings and stated that the Union would provide all of the "marijuana, liquor, and naked women, that they might be interested in. Baddour went on to recite that Jones said that if we don't have it we will get it for you." Baddour stated "for the record" that he wanted his employees to be aware that he did not approve of

illicit or unlawful conduct and there was no room for it in the company.

Baddour denied participating in a meeting in which a burned house was shown. He also denied making statements that there is no room for people in the company if they thought they need union representation or that the company has no place for anyone who wanted to be in a union. Baddour also testified that he did not have a written copy of the speech nor did he have any notes. He said that "I only made notes of the accomplishments through my lifetime." He stated further "I do a lot of public speaking and I never make notes." Baddour testified further that the only supervisors present at his meetings were Larry Hunsucker, Don Gibson and George Abraham. He

specifically denied that Leon Weatherford, vice-president, was present during any of his speeches.

Baddour's testimony in that regard was contradicted by Respondent's witnesses Rick Wakefield, department head and Larry Hunsucker who testified that Leon Weatherford attended all meetings at which Paul Baddour spoke.

The evidence shows that Paul Baddour had knowledge of union activity on August 16 and had met with his supervisors concerning union activity. However, he was unable to recall any meetings he had with his supervisors concerning the Union or whether the meetings were held in August, September or October. In addition, he was unable to recall what he

said in those meetings. Respondent also presented employee witnesses who denied that Paul Baddour made the statements alleged in the complaint. [2]

I find that the statements made by President Paul Baddour in his speeches had a coercive effect on the employees thereby affected their Section 7 rights.

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[2]/ The General Counsel's witnesses, Elton Hill, Jeffrey Ruffin, Kyle Wade Love, Jerry Britton and Danny Fitch, were employees of the Respondent at the time they testified. Their testimony was adverse to Respondent and was given at the risk of reprisal including loss of employment. Notwithstanding, each testified in a straightforward, unhesitating and steady manner. I credit them and not Paul Baddour and Respondent's other witnesses who merely denied hearing Paul Baddour make the statements in issue. Job-Right Supermarkets, 231 NLRB 500 (1977); Georgia Rug Mill, 131 NLRB 1304, 308 F.2d 87 (5 Cir. 1962).

Such conduct violates Section 8(a)(1) of the Act.

Respondent's Treatment of Larry Mayes

As previously stated on August 13 employee Larry Mayes contacted Duria Jones, the organizer of the Union, and that contact resulted in the organizational drive at Respondent's plant. Prior to contacting the Union, Mayes had discussions with fellow employees regarding the Union, and after that, he passed out union membership cards during breaks and after work in the employee parking lot. Larry Mayes was employed by the Respondent from April to August 27. He was employed as a general maintenance leadman on the third shift. Each day Mayes' supervisor, Bobby Boyd, left Mayes' work assignment for that

night. As lead person, Mayes oversaw the work of employees Frederick Taylor, Ellie Hibbler, Hubert Waldrip and Lorraine Woods. In addition, Mayes repaired concrete, and did minor carpentry, plumbing (including the repair of faucets) and electrical work.

After the first union meeting on August 17, Mayes was contacted at his home by his supervisor, Bobby Boyd. Boyd asked Mayes how the meeting went. Mayes responded by asking, "What meeting?". Boyd responded, "The Union meeting". Mayes then said "Okay". Boyd then told Mayes that he knew that Mayes started the union campaign. Mayes asked him where he got this information, and Boyd responded, "Well, someone told me". Boyd then asked Mayes how many people were at the meeting

and how many maintenance people were present.

According to Mayes that was the first time that Boyd called Mayes at home. Mayes later discussed his conversation with Boyd with four or five other employees at work that night. In the morning of August 18, Boyd had another conversation with Mayes in Boyd's office to give Boyd a routine report of what was done the night before. When he entered Boyd's office, employee Keith Townley was already there. In the presence of Townley, Boyd asked Mayes how many people had signed union cards and how many people were needed to get a union started. Mayes told him it took 30 percent to have an election.

Employee Keith Townley was called as a witness by Respondent and was asked if on the morning of August 19 he had a conversation with Boyd about the Union in Boyd's office. Townley said that he had. When asked if he was ever present during a discussion concerning the Union between Boyd and Mayes in Boyd's office, he replied that Boyd and he were talking and Mayes came in and "we talked about the Union . . . I believe it was about the Union cards. I'm not really sure." When asked what was said by Boyd and Mayes during that conversation the witness repeatedly responded, "I talked to Bobby several times on the union itself". Again the witness was asked what was said during the conversation and by whom. His response was "We was talking about union cards and Larry Mayes came in and Larry,

he took over and Bob never did ask him any questions at all." He was then asked "What did Larry Mayes say? You say he took over. What did he say?" The witness replied, "He started talking about how many union cards it would take to get the union election." Then the witness responded, when asked what Bobby Boyd said, "Well, you know, he was asking Bobby if he had any dealings with the Union before and Bobby said that he really didn't know what it would take. Then Larry would ask him a question and he would respond." When asked if he recalled anything else being said during the meeting the witness said, "No, I don't." He was then asked if he was in a position to overhear everything Mr. Boyd said while Mr. Mayes was in the room and the witness replied, "No, I left. As far

as I know they were still in there when I left. I don't know. When I left, Larry Mayes was standing up and, you know, a lot of times I have seen Larry tell him a job to do, but as far as hearing Bobby tell him -- ask him about any kind of union deal I never heard him say anything." He was then asked if he heard Bobby Boyd ask Larry Mayes how many employees had signed union cards and the witness said, "No, I didn't''.

I find Keith Townley's testimony to be worthless. He appeared to be previously coached to deny that Boyd asked Mayes any questions whatsoever about the Union during that conversation and the witness, unresponsively and incoherently, kept denying that Boyd asked Mayes any questions about the Union

even though the particular question asked may not have been whether Bobby Boyd questioned Mayes. The witness, who at the time was an employee of Respondent, testified in a guarded and seemingly fearful manner. I credit Larry Mayes who testified in a consistent, candid, straightforward and unhesitant manner. [3]

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[3]/ Respondent investigated Mayes' subsequent and then current employment with Memphis State University and found that he did not state in his application that he had worked for Baddour. Respondent subpoenaed Mayes' application and the custodian thereof from Memphis State University and presented that evidence in an attempt to discredit Larry Mayes. Thereafter, Mayes was recalled (by General Counsel) and testified that after being discharged by Baddour he applied for jobs at several employers and was turned down (apparently blackballed). Mayes said he believed that the reason he was turned down was the fact that he put in his application that he was previously employed by Baddour and, finally, in self defense. did not disclose that fact when he applied for the job which he obtained with Memphis State University. In the circumstances, I conclude that Mayes' actions in that regard were excusable

I find that supervisor Boyd's conduct to be unlawful interrogation in violation of the employee Mayes' Section 7 rights and a violation of Section 8(a)(1) of the Act.

Mayes attended the next union meeting on Thursday, August 19. Later that evening, about 8:45 p.m., Mayes received a call from supervisor Boyd. Boyd asked Mayes how the meeting went; how many people attended; and how many had signed cards. Mayes told Boyd that about 100 to 200 employees attended and that there were "quite a few" cards turned in. Boyd then said that it didn't sound too good.

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inasmuch as his and his family's livelihood were at stake. I credit his testimony.

Mayes told him that it was pretty good for the second union meeting. Boyd told Mayes that he had better be careful. Mayes asked what he meant, and Boyd said, "Just make sure you stay busy."

Mayes reported to work at about 11 p.m., that evening. Upon arriving he found that, contrary to past practice, no written work assignment was left for him that night. He said that as he punched in a supervisor was there. When he started down to the warehouse two supervisors were following him. Mayes said that Boyd always left him a list of work to be performed for that particular evening and that this was the first time that no list was left for him. He said that, inasmuch as he had no assigned duties, he decided to go around checking

expansion joints throughout the warehouse, a job considered to be his "main priority on the third shift". He said he was to make sure that the expansion joints (seams in the concrete) were repaired. As he proceeded around the warehouse checking expansion joints with pencil and pad in hand from 11:30 p.m. to 3:30 a.m. supervisors Lee Bourland and Rick Smith followed him. Mayes said it was obvious they were following him wherever he went. Normally they seldom left their own areas. When they were paged, they didn't have time to answer the page, "for going on along with me".

Mayes said that neither Bourland nor Smith was responsible for supervising him; that on that night shift, there

wasn't anyone present supervising him. He answered to supervisor Bobby Boyd every morning.

Mayes testified that he told Virgil Melton, Fred Taylor and Tyree Cordray about the supervisors following him. When Mayes went to Cordray and Miller's area they stopped and asked Mayes what he was doing and he told them. Mayes then told them that if they waited a minute one of them, supervisor Ricky Smith or supervisor Lee Bourland, would be in the vicinity watching him. Miller then said, "Yes, there he is, right on the other aisle". Cordray then told Mayes that he was being watched by either supervisor Smith or Bourland. Both supervisors carried pads at the time. Mayes further testified that supervisor Larry Hunsuckle

was also following him although Hunsuckle normally works the day shift.

Mayes' testimony was corroborated by witnesses Virgil Melton and Tyree Cordray. Employee Kyle Wade Love also testified that on a night in mid-August he noticed Lee Bourland following Larry Mayes on five or six occasions. He said that every time he saw Larry Mayes go by that night, Bourland would come by a short time after. He said also that he noticed Bourland following Mayes on two or three other nights, "up until the time that he was fired".

Mayes further testified that when he reported to supervisor Boyd at the end of the shift on Friday, August 20, he told Boyd that two people didn't show up and

he had to assign their duties to two other employees. Boyd asked Mayes what he had done that night. Mayes told him that he went around checking the expansion joints and looking for anything else in the warehouse that needed to be done; that inasmuch as Boyd didn't leave a list he didn't know what else to do that night. Boyd told him, "That was good". Boyd then told Mayes of a conversation he had with maintenance supervisor Marvin Highfill. Boyd said that Highfill told him that he knew that Mayes was the one that started, "that union".[4] While Boyd was talking to Mayes, Chris Ramsey, Boyd's immediate supervisor, approached. Boyd, Ramsey,

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[4]/ The warehouse was about a half a mile long and has concrete floors with rubber material between the sections in order to allow for expansion.

and Mayes then went to the seventh floor where Mayes was told about a water line they instructed him to install.

At about 8:15 a.m. Boyd asked and received from Mayes the list of expansion joints that Mayes had prepared the previous night. Mayes was asked to wait outside Boyd's office while Boyd talked to Ramsey. About 5 minutes later Boyd, Ramsey, and Mayes left and went to Director of Maintenance, Marvin Highfill's office. In Highfill's office, Boyd left per Highfill's instructions. Highfill asked Mayes if he liked his job and liked the people he worked with. Mayes told him that he was unhappy about the insurance benefits Respondent was cutting. Highfill then explained, in detail, why the insurance benefit had to

be cut. During the conversation Highfill received a phone call and left. During Highfill's absence, Ramsey told Mayes that when he (Ramsey) was in Florida working for a union contractor the bottom fell out making it tough on everybody who was in the Union. When Highfill returned he told Mayes that he would have to write him up because of his performance the night before. Mayes explained to Highfill that because Boyd did not leave a list he went around checking expansion joints[5] and had to assign employees to the clean-up crew. Highfill told Mayes that he was being given a warning for his poor performance.

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[5]/ At the time, Highfill checked the list of expansion joints prepared by Mayes that was on Highfill's desk.

On Sunday, August 22, Boyd called Hayes at home to inquire about the meeting with Highfill and Ramsey on Friday, August 20. Mayes told Boyd that Highfill gave Mayes a warning for not doing his job. Boyd asked Mayes if he had signed anything and Mayes told him he had not. Mayes also told Boyd that he felt that Highfill was about to fire him until Highfill got the phone call. Boyd told Mayes that Leon Weatherford, vice president of warehouse, prevented Highfill from firing Mayes, and ended the conversation by warning Mayes to look busy.

Mayes further testified that from August 22 through August 27 he noticed first shift supervisors Marvin Highfill, James Cox, Chris Ramsey, Larry Hunsucker

and James Tarver on third shift, wandering around the maintenance area. Mayes' testimony in that regard was corroborated by supervisors Tarver, Cox, Highfill, and Ramsey who stated that on one or two nights during that period they had reported to third shift.

On Friday, August 27, Mayes was called into Marvin Highfill's office in the presence of Highfill and Ramsey. Highfill asked Mayes what he had done that night and Mayes explained that he had been working on a water line most of the night and that he had a problem because they couldn't shut the pressure completely off and had a hard time finding the cut-off valve. Mayes said that because of that he had to pack the water line full of bread in order to

solder it. Highfill then told Mayes that they had reevaluated the situation the previous Friday (August 20) and had decided that it was best for the company if they let him go. Mayes asked Highfill why it took a week to reevaluate the situation and told him that the only reason Highfill didn't fire him the week before was that Leon Weatherford wouldn't let him. Mayes was discharged on August 27.

It is noted that prior to August 20, Mayes had not received a warning concerning his work. Mayes testified that, at the beginning of August, Supervisor Ramsey told him he was doing a great job. Supervisor Ramsey testified that on the night of August 26, he spent an hour looking at a blueprint with Mayes

trying to find the cut-off valve. Ramsey and Mayes could not find the cut-off valve so Ramsey told Mayes to hold off tapping the line until Bobby Boyd came in that morning. Ramsey also testified that not too long after Mayes had gone on third shift (the latter part of June) Mayes had come to see him and that Mayes was a little concerned that he was going to be stuck doing concrete repairs and painting for the rest of his life, "and I explained to him that we just had a backlog and that if he could get -- when he got caught up with that backlog we would go on to the preventive maintenance program that we had on hold, and that from all reports I had, he was doing a good job and continue on and we would move on into the next program".

Mayes' testimony concerning the length of time it took to move the water cooler is corroborated by Respondent's witness Frederick Taylor, a maintenance employee who testified that on the night of August 26, Mayes assisted him in moving a water cooler that night, and that it took about 12 to 13 hours to complete the job. Supervisor Ramsey testified that moving a water cooler would take a man and a helper, about 32 man hours or 2 full working days to complete.

Boyd admitted calling Mayes on August 17 at his home and asking Mayes how the union meeting went. Boyd denies any other mention of the Union in that conversation. He also denies that that was the first time that he called Mayes

at his home. He said he called him many times before to give Mayes work assignments.[6] Boyd denied discussing the Union with Mayes on August 18 in Boyd's office in the presence of Keith Townley but admitted that he had a conversation with Townley and Mayes. His testimony is in contradiction to that of Keith Townley who said that there was a conversation in Boyd's office in which the Union and union cards were discussed.[7] In

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[6]/ I credit Mayes and not Boyd. As previously stated, Mayes was a credible witness. He testified in a calm, candid, consistent and unhesitant manner. Boyd did not.

[7]/ Townley's testimony that Mayes asked Boyd how many cards it would take to get a union election' rather than the other way around is hardly believable. It strains credulity to believe that an employee would ask a supervisor that question, especially an employee who had just attended a union meeting and had initiated the union organization drive.

addition, Boyd admitted that he had a conversation with Mayes after he received his warning on August 20 and that he told Mayes he needed to stay busy. I find that Respondent, on August 17, 18, 19 and 20, engaged in interrogation and created an impression of surveillance of its employee Larry Mayes. Keystone Pretzel Bakery, 242 NLRB 492 (1979); Paul Kossman, 240 NLRB 192 (1979); Crown Zellerbach Corporation, 225 NLRB 911 (1976); Florida Steel Corporation, 224 NLRB 45 (1976).

Concerning the surveillance of Larry Mayes, Supervisor Rick Smith testified that on the night of August 19 he worked the third shift to fill in for another supervisor, Ricky Lee. He said he noticed Larry Mayes at about 11 p.m.

near the break area in unit 1 looking at timecards, and at 11:30 in unit 2 and 3 counting timecards. Smith, however, denies that he was following Mayes at that time. He stated he was merely going in the same direction as Mayes. Smith did not speak to Mayes about Mayes' conduct. Mayes admitted looking at timecards, but only in rack 1, and not racks 2 or 3, for a short time to look for the name of a person. Smith testified that he called Charles Smith, warehouse manager, and told him what he had observed about Mayes. Charles Smith told Rick Smith to further observe Larry Mayes and take notes if he needed to. Rick Smith testified that he observed Mayes from the period 11:30 p.m. to 2:30 a.m. He said he noticed on several occasions that Mayes was not working.

However, Rick Smith admits that he did not know what Mayes' job duties were.

Lee Bourland testified that he had a conversation with Rick Smith that night. He said Rick Smith informed him that Charles Smith had told Rick Smith to take general notes as to where Mayes was seen and what he was doing. Bourland admits that Rick Smith told him to keep an eye on this employee and if he saw him, write down a few notes. Inasmuch as Bourland did not know Mayes, Smith pointed Mayes out to him. Bourland stated that he saw Mayes with a maintenance man, who was cleaning up the bathroom in unit 2, and on other occasions that night he observed Mayes riding his cart or sitting on his cart or talking to other employees. Bourland said that this was the first

time a supervisor in another area was asked to watch or take notes on a particular employee who was not under his supervision. Bourland testified that he later informed Larry Hunsucker that he observed Mayes not doing any work and that Rick Smith had information regarding Mayes.

In a later meeting in Hunsucker's office in which Rick Smith and Lee Bourland were present, Rick Smith read his report concerning Mayes to Hunsucker. Bourland testified that the reason he did not give a report was that he felt Smith's report had adequate information in it to get Mayes fired. When asked why he was observing Mayes, Bourland responded, "To try to get enough to fire him, to prove that this man was not doing

his job -- if I could prove that this man was not doing a job, I would recommend that he be fired. I personally do not make the decision as to that man or any other man who gets fired." When asked why he would have an opinion on that since Mayes didn't work for him and he didn't know what Mayes' job was, the witness said he did not know what his was, "the reason I have an opinion on that is due to I was there observing the man and it was my opinion that the man was not doing anything except riding a cart and talking to other employees and not doing any feasible work.'' When asked how he knew that Mayes' job didn't call for riding a cart and talking to other employees about problems that could have occurred in maintenance, the witness admitted he did not know that. The

witness said, "that's why we were trying to get information to pass on to our superiors so they could check this out". The witness also admitted that he had been employed by Respondent in 1978 and became a supervisor in August 1981 and that in all that time he was never asked to observe and make notes on the performance of an employee who was neither under his supervision nor in his work area; that this was the first time that he was asked to do that.

Larry Hunsucker, director of warehouse operations, normally works on the first shift. He testified that he came to work on the night of August 19 to make himself available for any questions the employees may have concerning the

change of insurance benefits. He said the reason he worked that particular night was that he had a softball tournament in Tulsa, Oklahoma. He said he observed Mayes in unit 2, the picking and stocking area, and on two occasions in unit 3. Hunsucker said he thought it was rather odd for an employee to be riding around in a cart and not doing any work but he did not take any action to talk to Mayes to find out what he was doing. Hunsucker also testified that he had no knowledge of Mayes' job duties. He did not know Mayes was a lead person or that his job required him to talk to other employees.

It is obvious from the testimony of Mayes, Melton, and Amsted, and from the admissions of Respondent's supervisors, that Respondent engaged in surveillance

to discourage Mayes, the leading union adherent, and other employees from engaging in union activity. Two days after the first union meeting and the night of the second meeting the first shift supervisors were reporting to third shift and following Mayes around the warehouse. Knowledge of Mayes' union activities is not in question, especially in view of the conversations he had with supervisor Boyd, including a conversation in which Boyd told Mayes that he knew Mayes was the one that started the Union. Supervisor Tarver admitted that he had a conversation with two other supervisors, Cox and Highfill, prior to Mayes' discharge in which he informed them that Mayes was involved in union activity. At the time, both supervisors said they had

already heard that he was involved in union activity.

Moreover, none of the supervisors who admitted engaging in surveillance of Mayes had knowledge of Mayes' job duties or responsibilities. None was responsible for directly supervising Larry Mayes. None attempted to question Mayes regarding his job duties or his alleged lack of work performance that night. Bourland admitted that the purpose for watching Mayes was to try to get enough information to fire him. Both Hunsucker and Bourland testified to two incidents in which they noticed Mayes, "not performing his work on August 19". In those incidents Mayes could very well have been performing his duties as lead person in the mainterance department.

I find that the surveillance discussed above was coercive and interfered with the employees' Section 7 rights and thereby was in violation of Section 8(a)(1) of the Act. Soundesign Corporation, 232 NLRB 993 (1977); Stoughton Trailers, Inc., 2 NLRB 1203 (1978); Farah Manufacturing Company, Inc., 202 NLRB 666 (1973).

Warning and Discharge of Larry Mayes

Director of Maintenance Highfill testified that he made the decision to give Mayes a warning on August 20. His decision was based on a report purportedly written by Ricky Smith, a warehouse supervisor. The report was dated August 20 and addressed to Charlie

Smith. However, contrary to Highfill's testimony and the face of the report, Ricky Smith testified that he did not write the report; that the report was drafted by Marvin Highfill. Charlie Smith, the addressee, also testified that he had never seen this report. The report described several incidents in which Mayes was talking to other employees the night of August 19. Although the record indicates that several other employees talked to Mayes, Highfill could not recall if those employees received a warning or any other discipline.

Highfill testified that Mayes denied the content of the report and stated that he was working. Highfill admits that only Bobby Boyd, Mayes' immediate

supervisor, gave Mayes work assignments, yet Highfill made no attempt to discuss the report with Boyd or confront Boyd with Mayes' explanation of what he did that night. In fact, Boyd was not involved at all in the decision to give Mayes a warning. Highfill testified that on Friday, August 27, he called Mayes into his office and discharged Mayes, based on a report given to him by supervisor Chris Ramsey. The only supervisors present at Mayes' discharge interview were Chris Ramsey and Highfill. That Respondent had knowledge of Mayes' involvement in the union campaign and engaged in surveillance of Mayes from the period of August 19 through August 27, the date of his discharge, as previously indicated, is not in dispute. It is

curious indeed that on the night that Mayes first noticed that he was being followed, his supervisor failed to leave him a work assignment for that night. Respondent also admits through a supervisor that the reason Mayes was being followed on August 19 was to get enough information on him to terminate him. In other words, he was being "set up". Marvin Highfill, the supervisor who discharged Mayes, admitted that he had no knowledge of Mayes' job duties or responsibilities and made no attempt to involve Mayes' immediate supervisor in either the warning, dated August 20, or the discharge on August 27. Although Highfill denied any knowledge of Mayes' union activity at the time of Mayes' discharge, warehouse supervisor James Tarver testified that in a discussion

with Highfill prior to Mayes discharge he told Highfill that Mayes was involved in the Union. These direct contradictions between supervisors adds to the conviction that Respondent engaged in a deliberate campaign to fire Hayes for his union activity.

The General Counsel has proven by a preponderance of the evidence that Mayes was placed under surveillance, given a warning and later discharged because of his union activity. I find that the warning given Mayes on August 20 and that the discharge on August 27 to be in violation of Section 8(a)(3) and (1) of the Act.

Surveillance of Third Shift Employees

From the period of August 22 through August 27, according to the testimony of several witnesses, first shift supervisors Marvin Highfill, James Cox, Chris Ramsey, Larry Hunsucker, and James Tarver came on third shift from time to time and wandered around the maintenance area.

James Tarver testified that he was in the warehouse on third shift on two occasions during that period. On August 22 he was in the warehouse from 11 p.m. to 1 a.m. He said he came to discuss a problem with another supervisor, James Cox, regarding another employee, Alan Ursery. That conversation lasted only 30 to 40 minutes. Tarver also stated that he reported on third shift at 3:30 on

August 26 to make himself available "to my employees to ask questions about any problems they had with the Union situation going on." Supervisor James Cox testified that he reported on third shift on the morning of August 22 and August 25. He stated that the reason he reported on third shift was to talk to an employee named Al Ursery and to give him a warning concerning work performance. He said that conversation lasted approximately 30 to 45 minutes. Cox also stated that he reported to work on third shift on August 25 at 3 a.m. and left about mid-day just to see how things were going on the shift "and have a little contact with the people." He said that he strolled through the warehouse and made it a point to see all the people.

Marvin Highfill stated that he reported to work Sunday night, August 22, because he wanted to see how things were running and to talk to maintenance employees. Chris Ramsey testified that he was on the third shift on August 26 making third shift inspection. Ramsey also admits that his purpose on third shift was to check on Larry Mayes.

On the night of August 26, Ramsey testified,he noticed Mayes at 3:15 a.m. stopping his bicycle near a break area; taking a pad and pencil and making some notations. He said Mayes then proceeded on his bicycle and although Ramsey admitted he had no idea what Mayes was doing at the time, he took Mayes' actions as breaking early for lunch. Ramsey said he did not question Mayes about his

activity because he was not Mayes' immediate supervisor.

The evidence discussed above convinces me that supervisors Tarver, Cox, Highfill and Ramsey reported to third shift during the period of August 22 through August 27 to check upon the employees of third shift because that is where the suspected union activity and union adherents were located. It is clear from the testimony that each supervisor had prior knowledge of union activity among the employees before they reported to work on third shift. Tarver admits that he was told the night after the first union meeting by employees Keith Townley, Mike Bishop, and Alfred Oglesby that there had been a union

meeting. Tarver said he discussed this information with Marvin Highfill and James Cox. Tarver also stated he had a discussion with these two supervisors concerning Larry Mayes' involvement in the union campaign. Ramsey states he heard "some scuttlebutt" that there was talk of union activity the week of August 16. Cox testified it was reported to him by Jim Tarver that employees were passing out cards. Both Tarver and Cox testified that they reported on their shift to talk to an employee, Alan Ursery. Neither supervisor explained satisfactorily why he did not wait until first shift to speak to Ursery or why they did not report to work a few minutes early on their own shift in order to talk to Ursery.

Tarver, Cox, Highfill and Ramsey all admit that they reported to third shift to check up on that shift. This admission, considering the timing of their visits, strongly suggest their purpose was motivated by the on-going union campaign.

The Discharge of Employee David Cordray

David Cordray was an employee of Respondent from June 1981 until August 20, 1982. He worked on the third shift as a forklift driver and his immediate supervisor was Walter Webb, but during the week of August 16 through 20, David McCollum was acting supervisor in place of Webb.[8]

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[8]/ Walter Webb was a third shift supervisor over approximately 10 employees and although he does not have the authority to hire employees, he has the authority to recommend discharge.

On Monday, August 16, Cordray was informed by Larry Mayes about the union meeting to be held on August 17. On that same Monday, Cordray asked acting supervisor McCullom if he was planning to attend the union meeting. McCullom responded that he might. Cordray attended the meeting on August 17, signed a union membership card and took blank union membership cards home with him that

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Webb's duties are to plan work, assign work, give instructions and generally oversee the operations and initials employee timecards. In supervisor Webb's absence, McCullom performed Webb's duties. McCullom's regular job title is "Department Head." There is no dispute that during the week of August 16, McCullom was acting supervisor performing the duties of supervisor Walter Webb who was on sick leave during that time. I find that McCullom was a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act during the week of August 16.

night. Cordray also placed a Teamster bumper sticker on his car before he reported to work that night. When he arrived at work he noticed a bumper sticker on employee Pat Amsden's car which was parked next to Cordray's car.[9] Neither Cordray nor Amsden saw bumper stickers on any other cars that night. In addition to the above, Cordray's union activity consisted of passing out union cards in the Respondent's parking lot during the period August 17 through 20.

Respondent's parking lot is fenced in and scanned by video cameras on a 24-hour basis. The cameras have sufficient power

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9/ Cordray's testimony was corroborated by Pat Amsden who testified that there was a Union bumper sticker on his car that night and he saw a similar bumper sticker on Cordray's car.

to allow identification of individuals while in the parking lot. It is also established that Respondent issued identification stickers to its employees to be placed on the bumpers of their cars, thus permitting identification of the owner of any car in the parking lot by the cameras or otherwise.

Another Union meeting was held on August 19. On Wednesday, August 18, Cordray asked McCullom if he was planning to attend that meeting the following day. McCullom responded that he was not going to the meeting; that he didn't want any part of the union and, that the union was bad for the company. McCullom denied both the August 16 and August 18 conversations with Cordray.

On Thursday morning, August 19, all third shift employees attended a meeting at the plant. After the meeting, Cordray went to his work area to put away his belongings and then headed for the time clock to punch out. At that point, acting supervisor McCullom walked up to Cordray and stated, "Might need you to work overtime until 9:00. Can you work?" Cordray testified that he responded by saying, "No, I can't work today". Cordray then left the plant without anymore having been said by either McCullom or him. The conversation took place at about 8 a.m.

McCullom testified that he had asked Cordray if he could work overtime and Cordray replied, "Fuck it. I am leaving".

The next morning at about 7:15 a.m., Cordray was called into supervisor Mike Bond's office. Cordray gave Bond his version of what happened concerning the request to work overtime. Bond then told Cordray what McCullom said Cordray's response was. Cordray was then told to go back to work and as he was leaving Bond's office, Eason Camp, manager of picking and stocking, came by and told Cordray to go back to Bond's office. While in Bond's office, Cordray repeated to Eason Camp and Bond his version of what had happened the day before.

McCollum then appeared and told his version of what happened. Camp then asked McCollum if he was sure that that was what Cordray said. McCollum stated

that, "he wasn't sure and that he could have misunderstood". Camp stated, "You have to be sure for anything to be done". McCollum then said he was sure Cordray said it. (That was according to Cordray's testimony).

During that meeting Cordray was discharged for insubordination. Cordray's position was that he did not use profanity and that on many occasions he told McCollum that he could not work overtime when asked with impunity. Cordray said that the reason that he could not work overtime was that he had promised a friend that he would help him run his father's junk yard. Concerning that incident, former employee Dennis Gray testified that he heard Cordray tell McCollum that he "wasn't going to be able

to work overtime today". He further testified that he did not hear any reply. Gray said the remarks were made in a normal tone of voice and that the conversation took place about 10 to 15 feet away from where he was standing. He said he heard no profanity during the conversation.

In his testimony, McCollum denied telling Camp that he was' not sure what Cordray said. Respondent's position is that the reason for Cordray's discharge was for the remark he made to McCollum and not for refusing to work overtime. In that connection, it is noted that McCollum testified that he did not take the alleged comment made by Cordray as a remark directed at him personally. McCollum also testified when asked

whether working overtime was mandatory or voluntary on the part of the employees that he was never informed as to whether it was mandatory or voluntary. When asked whether he asked Cordray to work overtime in the past he said that he had and that Cordray had agreed to work overtime on some occasions and that on other occasions he "might have had something to do". Cordray could not remember any specific occasion that Cordray had not worked overtime when asked. McCollum said that Cordray did not say anything else in the conversation except what was stated above. McCollum was asked:

> "Q. Did you take that as a personal remark?
>
> A. No sir. Not really.

> Q. Now, it could have been stated, "You" instead of "It'', and then you would have taken it personally, I take it. Is that right?
>
> A. Yeah. If he had said "You", I would have."

McCollum testified that he knew of no other employee who had been discharged for making a similar comment and also testified that he did not know that Cordray would be discharged for making the remark that he allegedly made.

The General Counsel adduced evidence of other employees who used similar language in conversations with their supervisors and cases of insubordination in which the employees concerned merely received warnings but were not discharged.

Assuming arguendo, that Cordray did make that remark when asked to work overtime, admittedly, the remark was not directed at acting supervisor Cordray personally. At most,it was an expression of disgust because,at the time,he had made other plans. Considering the circumstances of the employee at the time (a commitment to help a friend) and the testimony of McCollum that he did not take the remark personally, I find it inconceivable that he would be fired for such a remark. McCollum's testimony that he did not know that Cordray would be fired for making the remark and Respondent's policy that working overtime is voluntary, not mandatory; and Respondent's contention that McCollum is not a supervisor, therefore, the remark was made to a fellow rank and file

employee; and considering the video cameras scanning the parking lot on a 24-hour basis wherein employees' cars (including those with union bumper stickers) can be identified by the company issued permits also on the bumper,[10] I am convinced that Respondent knew of Cordray's union activity and that the reasons given for discharging Cordray are pretextual. Respondent's discharge of David Cordray is a violation of Section 8(a)(3) and (1) of the Act.

10/ Not only did Cordray have a union bumper sticker on his car as well as the company assigned identification sticker, but he also passed out union membership cards to fellow employees in the parking lot in full view of Respondent's video cameras. Moreover, McCollum's testimony was not given candidly. He was nervous and hesitant. Cordray was straightforward and unhesitant. I credit Cordray.

The Discharge of Patrick Amsden

Patrick Amsden was employed by Respondent from August 27, 1978, until August 25, 1982. Before his discharge he was employed as a department clerk. As department clerk he checked in goods received in the receiving department and filled out maintenance forms. He also checked inventory accounts and made sure they corresponded with the computer print out. Immediately before his discharge Amsden worked the third shift, 11:30 to 8 a.m., for about two and a half years. His immediate supervisor was Ron Gatlin.

On August 17, Amsden was informed by fellow employee Larry Mayes of a union meeting scheduled for that day. Amsden attended the meeting and signed a union membership card. While there, Amsden

picked up blank union cards and a Teamster bumper sticker. From August 17 until his discharge, Amsden passed out union membership cards in the Respondent's parking lot before and after work. On the night of August 17, Amsden placed a union bumper sticker on his car before going to work. As previously stated, Amsden also noticed a bumper sticker on David Cordray's car in the parking lot next to his car.

On August 23, at 1 a.m., Amsden was working with another employee checking goods in. They were having a casual conversation while working. Ron Gatlin approached Amsden and told him that soliciting during work time was not allowed and he could get fired for it. Amsden responded that he did not know

what Gatlin was talking about. Gatlin then stated, "I don't want to see you get fired".[11]

Later that day at about 7 a.m., Amsden was summoned to area manager Shelley Smith's office. Upon arriving at Smith's office, only Smith was present. Smith told Amsden that he had heard some talk about a union out in the warehouse. Amsden said that he, also, had heard of such talk. Smith then told Amsden that the company could not function with the Union; they had to stay price competitive; and if the Union got in the company would have to pay higher wages and it could not afford it. Smith then told Amsden, "Look at International

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11/ Gatlin denied this conversation took place.

Harvester or Firestone. Those employees got a union, but they are out of a job. The Union didn't do them any good". Smith then said the company had borrowed some money and was having to pay high interest rates and that is why it wasn't giving the employees any raises and was having to cut back on benefits. Amsden asked Smith how he was going to survive without an increase in pay. Smith told him he had not received a raise for two years. Smith then told Amsden that he did not have to remind Amsden about his lateness situation. Smith then told him that in the future they would be keeping an eye on his tardiness and there wouldn't be anything he could do to help himself. Smith also told him that if he didn't quit "talking the union up" that they would find a reason to fire him.

Then he told Amsden that he should get a hair cut and try to wear better clothes to work. Amsden responded that he would get his hair cut. That conversation lasted about 30 or 40 minutes.[12]

Smith admits that Amsden was called into his office to have a conversation. Smith said that the conversation lasted only 5 to 10 minutes. He only told Amsden to cut his hair and to try to clean up his appearance. Smith also admits talking to Amsden about his attendance. Smith also testified that he had known Amsden for about 5 years and in that time there was no indication that he wasn't honest. He said he had no reason

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[12]/ Amsden was tardy three times during the previous six months.

to disbelieve him because he had never caught Amsden in a lie.

On the night of August 23, Amsden reported to work at 11:30 p.m. and while working he noticed Mike Bond, a supervisor, standing a couple of aisles away from him watching him. Amsden said, "Hi" to Bond. About three or four times that night, Amsden noticed Bond was just standing a couple of aisles away (about 15 feet) watching him. At about 4:05 a.m., employee Virgil Melton told Amsden that Mike Bond was watching him and Amsden ought to be careful. At about 4:30 a.m. that day, Amsden was sitting on his forklift leaning to his right looking at his clip board. He had checked some locations the day before and he was going over his notes to make sure the right

number of cases of goods were in the right locations. Amsden said that, around that time, he looked up and saw Virgil Melton pass by. Melton had whistled while passing and Amsden nodded his head to acknowledge his presence. Amsden then directed his attention back to his clip board and when he looked up again he saw Mike Bond standing to his left in front of his forklift. Bond asked Amsden "Are you having trouble keeping your eyes open?" Amsden responded, "O don't know what you're talking about. I am reading off of my clip board". Bond again asked, "Are you having trouble keeping your eyes open?" Amsden again responded, "I don't know what you're talking about. I am reading off my clip board". Bond then walked over to a phone and made a call. Amsden

testified that he did not see Bond approach him because Amsden was looking down to his right at his clip board when Bond walked up to his left. At the time, the forklift was running and made a slight noise.[13]

Shortly after the above incident, Amsden hurt his finger. He went to the emergency clinic late that night and reported back to work that morning at about 9 a.m., and clocked out.

Amsden's testimony is corroborated by Virgil Melton, also a forklift driver on

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13/ The forklift has an electric motor and a foot accelerator. If a person fell asleep while the motor was running it would be dangerous if his foot accidentally touched the accelerator.

third shift supervised by Ron Gatlin. Melton stated that he noticed Mike Bond walking around and following Amsden. Melton also testified that later that afternoon, Ed Yoches, an employee, told Melton to stay away from Amsden because they were setting him up to fire him and, later that morning, Melton warned Amsden to be careful, that they were trying to set him up.

At about 5 a.m., Melton was riding through the warehouse. He passed Amsden in one of the side aisles and whistled and waved, thus corroborating Amsden's testimony. Melton said Amsden looked up and nodded his head and went back to writing on his clip board. Melton said that he had goods that he had to place in the next aisle and as he was backing his

forklift into that aisle, he noticed Bond cross from the main aisle. Bond was about 20 feet up the side aisle. Melton then placed his goods down and came out of the other end of the aisle. When he drove past the aisle in which he saw Amsden he noticed Mike Bond standing next to Amsden and that Amsden had straightened up on his lift and had his arms crossed. Melton said that it was about 30 seconds to a minute from the time he saw Mike Bond and the time he placed his goods in location and drove pass Amsden again. According to Melton's testimony, Bond could not have been standing next to Amsden for more than 30 seconds.

Employee Virgil Melton testified that he went to the supervisor's desk that

evening to deliver some bills of lading and Amsden was there, "He had hurt his finger and he told me he was getting ready to go to the doctor and told me that Mike (Bond) had accused him of sleeping and I asked him, Was it when I come by and whistled at him, and he said, Yeah, and I said, Well -- I told him he didn't have nothing to worry about because he wasn't sleeping. So, you know, don't be worried. I seen him". Melton further testified that later that morning he had a conversation with his supervisor, Ron Gatlin. Melton said, "I asked him, you know I heard from some more employees that he was fixing to be fired." He said that Gatlin responded that he didn't know "that Mike said he was asleep". Melton responded, "Yeah, and I said, well, I went by there and he

wasn't asleep then and if Mike said he was asleep that he was a damn lie". He said that supervisor Gatlin had told him that Bond had watched Amsden about 3 minutes. He then said that Gatlin didn't say anything else and, "I was just mad and got on my lift and rode off, and went back to work".

Mike Bond testified that he was working third shift on the night of August 24 and his purpose for being on third shift was that he was filling in for a supervisor, Walter Webb, who had his wisdom tooth extracted the week before.[14]

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[14]/ It is noted that Bond also testified that David McCollum, the department head, takes over Webb's job responsibilities when Webb is absent from work. That was also admitted by Respondent's supervisor Eason Camp. No

Bond denied that he watched or followed Amsden on the night of August 24. He stated that he found Amsden around 4:25 a.m., sometime in that time range, asleep on a forklift. According to Bond he walked up to Amsden to speak to him and Amsden was sitting on his lift with his eyes closed and his head was bobbing. Bond testified that he stopped and stared at Pat Amsden. He had never stopped and stared at him at any other time.

Lunch for that shift was over at 4:05 a.m. at which time the buzzer went off and everybody went back to work. He said

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explanation was given why Bond and not McCollum was filling in for Webb as had been the practice.

that around 4:25 or 4:30, "somewhere in that time, anywhere from 15 to 25 minutes after the employees went back to work following the lunch break" he noticed a lift sitting approximately 3 or 4 bays into the aisle off to the left side of that aisle. Bond testified, "and like I said, when I walked through I normally speak to everybody that I see and I looked up and I was going to speak and Pat Amsden was sitting on his lift and his eyes were closed and his head was bobbing and so I didn't speak. I just stood there approximately about 2 minutes or so and then I walked up to the lift and his eyes were still closed. I could see his eyes and his head was still bobbing. And his head got to bobbing more and I walked up to the lift and stood there approximately another minute

or two, a total of around 3 or 5 minutes watching him and his eyes were still closed. His head started bobbing violently and at one time it -- when it dropped, his eyes kind of opened up and I could see him catch my image from the corners of his eyes and at that time he rolled his head back to the right away from me and started looking down at the clip board next to him and I asked him, I said, 'Pat, what are you doing?' and he said, 'checking some locations' and I walked around to the back side of the lift and asked him, I didn't ask him at that time, I looked at the clip board to see if there was something there you know, for him to generate that type answer, and he had some receiving reports there and I asked him, you know Pat, you know, weren't you asleep? and he said, I

was 'checking some locations'. That's all he would say. And at that time I turned around and walked over to the phone which is about a aisle over and paged the supervisor, Ron Gatlin, and reported the incident to him and told him, you know, I would get a written memo to Shelley (Smith) which is Ron Gatlin's boss on this which I have just seen." Contrary to the testimony of Amsden and Melton, Bond testified that at the time, the forklift was not running. When questioned how long he observed Mr. Amsden asleep, Bond repeated that it was "3 to 5 minutes".

It is hardly credible that Bond saw the forklift, saw Amsden on it, went there to greet him, found him asleep and stood there 3 to 5 minutes observing him

without saying a word until Amsden, on his own, awakened. In addition, it is peculiar that Bond was filling in for supervisor Webb at the time with no explanation as to why McCollum, who usually filled in for Webb, was not filling in for him. Moreover, Respondent presented two employee witnesses, Ed Yoches and Mike Ward who testified that they were in the area at the time Bond allegedly caught Amsden asleep. Both witnesses stated that they did not know whether Amsden was asleep or not, only that he appeared to be sleeping. It is also noted that both Yoches and Ward testified that Amsden was a friend of theirs, yet, when they saw Amsden, if indeed they thought he was asleep, neither made an attempt to wake him. Yoches said, at the time of Amsden's

discharge, August 25, he had no knowledge or even rumors of union activity. Yet, President Baddour addressed a memo to all employees dated August 24, concerning the Teamsters union.

As previously stated, supervisor Shelley Smith in a conversation with Amsden informed him the company could not function with a union and that unionized employees of Firestone and Harvester were now out of a job. Smith further said the company could not afford the Union and the Union would not do any good. Smith also threatened Amsden with discharge if he continued to talk up the union. I find that the purpose of Smith's statements was to coerce and discourage Amsden regarding his union activity, and therefore in violation of Section 8(a)(1)

of the Act. Amsden testified in a forthright, clear, detailed and consistent manner. Smith, on the other hand, was vague, incomplete and often evasive in his testimony.

Both Amsden and Melton testified in a calm, controlled and direct manner, that they noticed Mike Bond, a first shift supervisor working on third shift at the time, watching Amsden. I am convinced from the evidence adduced that Bond's purpose for reporting to third shift was to watch the union activities of the third shift employees, including known union adherent, Pat Amsden.[15]

15/ Bond testified in a shifty and nervous manner. He was not credible.